Supreme Court, U.S.
FILED
FEB 28 2000
CLERK

(4) (3) (2)

Nos. 99-1257, 99-1263, 99-1266

IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,
Petitioners

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN RESPONSE FOR THE RESPONDENTS APPALACHIAN POWER CO., *et al.*

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded to the U.S. Environmental Protection Agency ("EPA" or "the Agency") revised National Ambient Air Quality Standards ("NAAQS") promulgated under Section 109 of the Clean Air Act, 42 U.S.C. § 7409, for that Agency to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the court of appeals properly construed the scope of the Agency's discretion in defining those criteria.

2. Whether the court had jurisdiction to review a final rule promulgated by EPA under the Clean Air Act which resolved the question of the Agency's authority to replace the congressional "Subpart 2" ozone reduction program in certain areas of the country with a different program of the Agency's own creation under "Subpart 1" of the Clean Air Act.

3. Whether this Court should grant certiorari to review the D.C. Circuit's unanimous rejection of EPA's final rule regarding the manner in which the Clean Air Act provides for attainment of ozone NAAQS.

PARTIES TO THE PROCEEDINGS

1. CAA Industry Respondents are petitioners in one or both of the two consolidated cases addressed by this conditional cross-petition for a writ of certiorari: *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1440 (and consolidated cases), and *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1441 (and consolidated cases).

Alliance of Automobile Manufacturers (petitioned as American Automobile Manufacturers Association in the cases below)
American Forest & Paper Association
American Iron & Steel Institute
American Petroleum Institute
American Public Power Association
Appalachian Power Co., *et al.* is comprised of the following:
Baltimore Gas and Electric Company
Carolina Power & Light Company
Central and South West Services, Inc.
Central Power and Light Company
Public Service Company of Oklahoma
Southwestern Electric Power Company
West Texas Utilities Company
Central Illinois Public Service Company
CINergy Corp.
Columbus Southern Power Company
Conectiv (petitioned as Delmarva Power & Light Co. and intervened as Atlantic City Electric Co. in the cases below)

Consumers Energy Company
Dayton Power and Light Company, The
Detroit Edison Company, The
Duke Energy Co.
FirstEnergy (petitioned as Ohio Edison Co. and Centerior Energy Co., (with Centerior Energy Co. subsidiaries Cleveland Electric Illuminating Co. & Toledo Edison Co.) in the cases below)
Florida Power Corporation
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Kansas City Power & Light Company
Kentucky Power Company
LGE Energy Corp. (petitioned as Kentucky Utilities Company and Louisville Gas & Electric Co. in the cases below)
Madison Gas and Electric Company
Minnesota Power Company
Monongahela Power Company,
dba Allegheny Power System, Inc.
Northern Indiana Public Service Company
Oglethorpe Power Corporation
Ohio Power Company
Ohio Valley Electric Corporation
Otter Tail Power Company
PacifiCorp
PPL Electric Utilities Corporation
dba PPL Utilities (petitioned as Pennsylvania Power & Light Corp.)
Plains Electric Generation & Transmission

Cooperative, Inc.
Potomac Edison Company, The
dba Allegheny Power System, Inc.
Potomac Electric Power Company
Public Service Company of New Mexico
Salt River Project
South Carolina Electric & Gas Company
Southern Company
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric & Power Company
Tampa Electric Company
Union Electric Company
Virginia Power
West Penn Power Company
dba Allegheny Power System, Inc.
Wisconsin Electric Power Company
and
Edison Electric Institute
National Rural Electric Cooperative Association
Chemical Manufacturers Association
Meridian Gold Company
Midwest Ozone Group
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
(petitioned as National Petroleum Refiners Association in the case below)
Nevada Mining Association
Newmont Gold Co.

Phoenix Cement Company
United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

2. The following parties are petitioners in one or both of the two consolidated cases addressed by this brief in response, but have not joined CAA Industry Respondents in filing this brief in response.

American Farm Bureau Federation
American Portland Cement Alliance
American Trucking Associations, Inc.
James Bassage
Burns Motor Freight, Inc.
Central Illinois Light Co.
Chamber of Commerce of the United States of America
Citizens for Balanced Transportation
Commonwealth Edison
Duquesne Light Co.
Equipment Manufacturers Institute
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory
Idaho Mining Association
Judy's Bakery, Inc.
Kennecott Energy and Coal Company
Kennecott Holdings Corporation
Kennecott Services Company
David Matusow
Brian McCarthy
National Association of Manufacturers

National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Small Business United
National Stone Association
Non-Ferrous Founders' Society
Oklahoma Gas & Electric
Richard Romero
Small Business Survival Association
State of Michigan
State of Ohio
State of West Virginia

3. Petitioner United States Environmental Protection Agency was the respondent in all of the proceedings below.

4. The following parties were intervenors in one or both of the two consolidated cases addressed by this brief in response.

American Lung Association
American Road and Transportation Builders Association
Atlantic City Electric Company
Commonwealth of Massachusetts
State of New Jersey

5. The following parties appeared as *amici curiae* in one or both of the two consolidated cases addressed by this brief in response.

Representative Tom Bliley

Senator Orrin G. Hatch
State of Connecticut
State of New Hampshire
State of New York
State of Vermont

RULE 29.6 DISCLOSURE STATEMENT

1. The following list of CAA Industry Respondents hereby discloses the parent companies of respondents and any publicly held companies that own 10% or more of respondents' stock.

Alabama Power Company
(a subsidiary of Southern Company)
Appalachian Power Company
(a subsidiary of American Electric Power Company, Inc.)
Baltimore Gas and Electric Company
(a subsidiary of Constellation Energy Group, Inc.)
Central and South West Services, Inc.
(a subsidiary of Central and South West Corporation)
Central Illinois Public Service Company
(a subsidiary of Ameren Corporation)
Central Power and Light Company
(a subsidiary of Central and Southwest Corporation)
Columbus Southern Power Company
(a subsidiary of American Electric Power Company, Inc.)
Consumers Energy
(a subsidiary of CMS Energy Corporation)
Dayton Power & Light Company, The
(a subsidiary of DPL Inc.)
Florida Power Corporation
(a subsidiary of Florida Progress Corporation)
Georgia Power Company

(a subsidiary of Southern Company)
Gulf Power Company
(a subsidiary of Southern Company)
Illinois Power
(a subsidiary of Illinova Inc.)
Indiana Michigan Power Company
(a subsidiary of American Electric Power Company, Inc.)
Indianapolis Power & Light Company
(a subsidiary of IPALCO Enterprises, Inc.)
Kentucky Power Company
(a subsidiary of American Electric Power Company, Inc.)
Mississippi Power Company
(a subsidiary of Southern Company)
Monongahela Power Company
(a subsidiary of Allegheny Energy, Inc.)
Northern Indiana Public Service Company
(a subsidiary of NiSource Inc.)
Ohio Power Company
(a subsidiary of American Electric Power Company, Inc.)
Potomac Edison Company, The
(a subsidiary of Allegheny Energy, Inc.)
Public Service Company of Oklahoma
(a subsidiary of Central and Southwest Corporation)
Savannah Electric & Power Company
(a subsidiary of Southern Company)
South Carolina Electric & Gas Company
(a subsidiary of SCANA Corporation)
Southwestern Electric Power Company
(a subsidiary of Central and Southwest

Corporation)
Tampa Electric Company
(a subsidiary of TECO Energy, Inc.)
Union Electric Co. (a subsidiary of Ameren Corp.)
Virginia Power
(a subsidiary of Dominion Resources, Inc.)
West Penn Power Company
(a subsidiary of Allegheny Energy, Inc.)
West Texas Utilities Company
(a subsidiary of Central and South West Corporation)
Wisconsin Electric Power Company
(a subsidiary of Wisconsin Energy Corporation)

2. The following CAA Industry Respondents have no parent corporations, and no publicly-held companies have a 10% or greater ownership interest in these respondents.

Alliance of Automobile Manufacturers (petitioned as American Automobile Manufacturers Association in the cases below)
American Forest & Paper Association
American Iron & Steel Institute
American Petroleum Institute
American Public Power Association
Carolina Power & Light Co.
CINergy Corp.
Chemical Manufacturers Association
Conectiv
Detroit Edison Co.
Duke Energy Corp.
Edison Electric Institute
FirstEnergy Corp.

Jacksonville Electric Authority
Kansas City Power & Light Co.
LGE Energy Corp.
Madison Gas and Electric Co.
Meridian Gold Co.
Minnesota Power
Midwest Ozone Group
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association (formerly National Petroleum Refiners Association)
National Rural Electric Cooperative Association
Nevada Mining Association
Newmont Gold Co
Oglethorpe Power Corp.
Ohio Valley Elec. Corp.
Ottertail Power Co.
PacifiCorp
PP&L Electric Utilities Corporation
dba PPL Utilities
Phoenix Cement Company
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Electric Power Co.
Public Service Company of New Mexico
Salt River Project
Southern Company
United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

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BRIEF IN RESPONSE TO PETITIONS FOR CERTIORARI

On May 14, 1999, the United States Court of Appeals for the District of Columbia Circuit remanded to the United States Environmental Protection Agency ("EPA" or "the Agency") the Agency's revised National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter ("PM"). EPA has petitioned for a writ of certiorari (No. 99-1257) on parts of that decision, as confirmed and clarified upon rehearing on October 29, 1999. The American Lung Association ("ALA") (No. 99-1265) and the states of Massachusetts and New Jersey ("State Petitioners") (No. 99-1263) have filed petitions seeking review of the same issues. This response is being filed on behalf of trade associations representing most of the major industries in this country, including the utility industry, automobile industry, coal industry, mining industry, oil industry, iron and steel industry, chemical industry, paper industry, paint and coating industry and home building industry; over 50 individual companies; and other organizations (hereinafter referred to as "CAA Industry Respondents"). These companies and organizations are listed on the cover to this brief.

This Court should deny these petitions as to the lower court's holding on Subpart 2 to Part D of Title I of the Clean Air Act ("CAA"). As to the questions Petitioners present regarding the "nondelegation" holding, if certiorari is granted, it must encompass review of the lower court's

decision limiting the factors that may be considered by EPA on remand in developing an "intelligible principle."[1]

STATEMENT OF THE CASE

1. *The NAAQS Program* – Section 108(a), EPA App. 109a-110a, provides for regulation of an ambient air pollutant that "endangers" public health. Under §§ 108 and 109 of the Act, EPA App. 109a-113a, NAAQS are to be based on a "criteria document," that "accurately reflects the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare" associated with the presence of a pollutant in the ambient air. Under § 109(b), State App. 102, "primary" NAAQS are set at a level that, allowing an "adequate margin of safety," is "requisite to protect the public health." Secondary standards are set at a level that is "requisite to protect the public welfare from known or anticipated adverse effects." Under § 109(d), State App. 102, NAAQS may be revised periodically "as may be appropriate" in accordance with § 108 and § 109(b).

2. *The EPA Rulemaking* – In the case below, CAA Industry Respondents challenged EPA's decision to establish new "public health" policy under § 108 and § 109 of the Clean Air Act as reflected in its decision (1) to revise the existing NAAQS for ozone and PM, and (2) to replace the ozone reduction program enacted by Congress in 1990 based on the 1-hour NAAQS (the "Subpart 2" program, CAA Industry Cross-Petitioners App. ("ICP App.") 2a-62a) with a

[1] Out of an excess of caution, a Conditional Cross-Petition for Certiorari addressing this issue is being filed today. The companies and organizations joining in that Cross-Petition ("CAA Industry Cross-Petitioners") are listed on the cover of that petition.

different program to be developed by EPA under the general planning requirements of Subpart 1 of the Act and based on a new 8-hour ozone NAAQS.

While EPA and other petitioners claim these standards are needed to address serious health risks, the record below presents a very different picture. With respect to the ozone NAAQS, EPA's independent science advisers (the Clean Air Scientific Advisory Committee or "CASAC")[2] concluded, based on their extensive review of the science, that none of the ozone levels that were considered for the revised NAAQS (including the existing ozone NAAQS) could be distinguished as significantly more protective of public health than the others.[3] EPA's staff similarly observed that a standard equivalent to the existing 1-hour NAAQS "would reduce estimated exposure of the at-risk population sufficiently to provide some margin of safety."[4]

As for PM, the same independent science advisers could form *no* consensus on the level, averaging time or form of a revised PM NAAQS because of many uncertainties regarding the existence and nature of any causal relationship between public health, on the one hand, and the fine particle indicator

[2] CASAC is the independent body created by Congress to provide scientific advice to EPA on NAAQS decisions. *See* CAA § 109(d)(2), EPA App. 112a.

[3] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 236, ("[T]he Panel concluded that there is no 'bright' which distinguishes any of the proposed standards . . . as being significantly more protective of public health.").

[4] EPA, Review of the National Ambient Air Quality Standards for Ozone: Assessment of Scientific and Technical Information 167 (1996) ("Staff Paper"), Ozone JA 1790.

("$PM_{2.5}$") chosen for the revised NAAQS, on the other.[5] Given these uncertainties and the lack of air quality data for $PM_{2.5}$, the Administration delayed implementation of the $PM_{2.5}$ NAAQS until at least 2002 so that the revised standard could be reevaluated.[6]

The uncertain science regarding possible health effects associated with exposure to extremely low ambient concentrations of these substances,[7] coupled with EPA's assumption that there is no threshold for effects for these substances, made it impossible to distinguish among the range of alternative standard levels based on public health protection alone.[8] EPA's decisions to revise these NAAQS

[5] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (June 13, 1996), PMJA 3167 ("The diversity of opinion . . . reflects the many unanswered questions and uncertainties associated with establishing causality of the association between $PM_{2.5}$ and mortality."); *see also* 62 Fed. Reg. 38,689 n.90 (suggesting a lack of direct evidence of a relationship between long-term $PM_{2.5}$ exposure and health effects).

[6] The President, Memorandum of July 16, 1997, "Implementation of Revised Air Quality Standards for Ozone and Particulate Matter," 62 Fed. Reg. 38,421 (1997), ICP App. 72a. This decision was codified by Congress. *See* Transportation Equity Act for the 21st Century § 6101, Pub. L. 105-178, 112 Stat. 463 (1990), ICP App. 66a.

[7] In the case of ozone, for example, EPA's science advisers observed that the revised standard would regulate concentrations approaching background levels. CASAC Tr. (March 22, 1995) at 296, Ozone JA 278; Comments by George T. Wolff (March 27, 1995), at 4, Ozone JA 383; Staff Paper at 20, Ozone JA 1830.

[8] *See, e.g.*, 62 Fed. Reg. 38,883 (ozone); 62 Fed. Reg. 38,688 (PM) (the Administrator's margin of safety determinations "are largely judgmental in nature, particularly with respect to nonthreshold pollutants, and may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric.").

therefore were driven not by science, but by the Administrator's policy judgment, unbounded by any intelligible principle, as to how much protection is "sufficient[]" in light of "[u]ncertainties associated with inconclusive scientific and technical information" and "hazards that research has not yet identified."[9] Furthermore, these policy judgments were exercised against a background of declining pollutant concentrations due to CAA programs already in place.[10]

In exercising this policy judgment, EPA explained at length factors that it asserted were *not* relevant to its decision[11] and then identified several health-related factors that it did consider.[12] EPA wholly failed, however, to articulate any principle that would guide the exercise of its discretion in

[9] 62 Fed. Reg., 38,857, (ozone); 62 Fed. Reg. 38,653 (PM).

[10] *See, e.g.*, EPA, *National Air Quality and Emissions Trends Report, 1995* at 1, 61 (1996), PMJA 4152-53 (ambient PM_{10} concentrations decreased by 22 percent between 1988 and 1995 and the number of areas designated nonattainment for ozone decreased by 30% between 1990 and 1996).

[11] These factors included the cost and technological feasibility of controls, the disruptive impact of replacing the congressional ozone reduction program with a new program to be devised by EPA, and the public health "disbenefits" of more restrictive standards. 62 Fed. Reg. 38,878-83, 38,884-85 (ozone); 62 Fed Reg. 38,683-89 (PM); *Responses to Significant Comments on the National Ambient Air Quality Standards for Ozone* 128-33 (July 1997), Ozone JA 210-15; EPA, *Responses to Significant Comments on the 1996 Proposed Rule on the National Ambient Air Quality Standards for Particulate Matter* 112 (July, 1997), PMJA 312.

[12] The factors that EPA did consider included the magnitude and severity of health effects, uncertainty in the data, and the size of the sensitive population. EPA Pet. 15 n.9, EPA App. 7a.

choosing, based on these health-related factors, from among air quality levels that could not be distinguished from a public health protection standpoint. It simply asserted that where there is scientific uncertainty, the courts must defer to the Administrator's "reasoned" judgment even if the Agency articulates no principle for assessing whether the resulting standard is reasonable.[13]

As a result, the revised NAAQS reflected EPA's interpretation of § 109 to provide no intelligible criteria to guide the Administrator's risk management decisions. Following this theory, the Administrator's discretion in choosing among health protective alternatives was unconstrained, for example, by EPA's own analyses showing that the costs to society of the revised ozone NAAQS would significantly outweigh its benefits.[14]

Finally, as a result of the failure of the pre-1990 Clean Air Act program to reduce ozone under the general planning authority of Subpart 1 of Part D, Title I of the Act, Congress in 1990 enacted a detailed statutory program as Subpart 2 to Part D. This new statutory ozone reduction program was based on the existing 1-hour NAAQS and reflected Congress' judgment that addressing the public health risks associated with low-level ozone exposures does not require inflexible attainment deadlines or massive economic or social

[13] *See, e.g.*, 62 Fed. Reg. 38,883, (ozone); 62 Fed. Reg. 38,688 (PM).

[14] *See* EPA, *Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* ES-12, ES-17, ES-20 (July 16, 1997), Ozone JA 2919, 2924, 2927 ("RIA"). In the case of the revised PM NAAQS, EPA estimated the cost of attainment at $37 billion annually. *Id.* at 9-1, Ozone JA 2934.

dislocation – aspects of the pre-1990 Subpart 1 ozone reduction program that made that program unworkable.[15]

The statutory Subpart 2 program includes specific strategies and timetables, based on the existing 1-hour ozone NAAQS, for reducing ground-level ozone concentrations. It applies to both nonattainment and attainment areas.[16] And it explains how to regulate areas that are now in attainment but that may have deteriorating air quality and become nonattainment areas in the future.[17]

To avoid any confusion about how ozone reductions were to be achieved under the Clean Air Act, Congress provided in § 181(a) of Subpart 2 that "each area designated nonattainment for ozone pursuant to § 107(d)" – a provision that governs designation of *all* existing and future ozone nonattainment areas as a prerequisite for regulating that area under the Act – "shall be classified at the time of such designation, under table 1, *by operation of law*" and then regulated according to its Subpart 2 classification. CAA § 181(a), EPA App. 117a (emphasis added). In this way Congress blocked EPA from initiating an alternative ozone reduction program under Subpart 1 based on a more stringent ozone NAAQS.

[15] *See* 1 Sen. Comm. on Env. & Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1990*, 1236-37 (Comm. Print, 1993) ("1990 Legis. Hist."), (H.R. Debate Oct. 26, 1990, statement of Rep. Fields); H.R. Rep. No. 101-490, Pt. 1, at 145-148, 229-258, *reprinted in* 2 1990 Legis. Hist. at 3169-72, 3253-82.

[16] *See, e.g.*, CAA § 184(b), ICP App. 55a-56a (requiring specific implementation measures in attainment areas of states within an ozone transport region).

[17] *See* CAA § 181(b)(1), EPA App. 119a-120a.

Despite this clear statutory language, EPA in its final rule revising the ozone NAAQS promulgated a provision (40 C.F.R. § 50.9(b), State App. 113) authorizing EPA to revoke the congressional Subpart 2 program for areas that have air quality meeting the 1-hour NAAQS. The provision requires EPA to replace the Subpart 2, 1-hour NAAQS-based regulatory program in these areas with a program that EPA would develop for the revised 8-hour NAAQS under the general planning requirements of Subpart 1,[18] the approach Congress *rejected* in adopting Subpart 2. Pursuant to that provision, EPA subsequently revoked the 1-hour NAAQS and Subpart 2 program in a number of areas.[19]

3. *The Lower Court's Opinion* -- Because of the various flaws in EPA's reasoning summarized above, on May 14, 1999, a panel of the D.C. Circuit remanded the revised NAAQS for ozone and PM to EPA. First, after a thorough review of the record, the panel concluded that, because the Administrator's interpretation of § 109 failed to provide *any* intelligible principle for exercising public health policy judgment in response to uncertain and inconclusive science (i.e., because her interpretation of § 109 "[f]ail[ed] to state intelligibly how much [risk] is too much"), the Administrator's interpretation would render this provision an unconstitutional delegation of authority. EPA App. 5a-6a. The court did *not* hold the statute itself unconstitutional but rather remanded the NAAQS for EPA to exercise the discretion delegated to it by Congress to interpret § 109 in a

[18] 62 Fed. Reg. 38,873, ICP App. 74a-75a.

[19] *See, e.g.*, 64 Fed. Reg. 30,911 (1999); 63 Fed. Reg. 31,014 (1998); 63 Fed. Reg. 39,432 (1998).

way that provides intelligible criteria for implementing it. EPA App. 14a.

Second, the court rejected EPA's interpretation of the CAA as prohibiting consideration of the protective effect of ozone in the ambient air with respect to ultraviolet B ("UVB") radiation when it establishes an ozone NAAQS. According to the court, "it seems bizarre that a statute intended to improve human health would, as EPA claimed at argument, lock the agency into looking at only one half of a substance's health effects."[20] EPA does not seek review of this part of the lower court's decision.

Third, the panel rejected EPA's legal conclusion, embodied in § 50.9(b) of the rule, State App. 113, that EPA had authority to rewrite the congressional ozone reduction program. The court relied on the plain language of the statute directing that the congressional Subpart 2 program apply "by operation of law" to "[e]ach area designated nonattainment for ozone" under the CAA – explicit language that the court found dispositive under the first prong of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). EPA App. 38a. On this basis, the court held that EPA could enforce a revised ozone NAAQS only "under Subpart 2," EPA App. 43a, and that the Agency was precluded "from requiring areas to comply either more quickly *or with a more stringent NAAQS*." EPA App. 40a (emphasis added).[21]

[20] EPA App. 47a. Respondents also raised the public health disbenefits issue as to the revised PM NAAQS and EPA rejected those comments on the same grounds that it relied upon in refusing to consider the issue in the ozone rulemaking.

[21] In another part of its opinion that has gone unchallenged, the panel vacated the revised coarse PM standards. EPA App. 53a, 57a-58a.

On October 29, 1999, the D.C. Circuit panel rejected EPA's petition for rehearing, except for minor editing which, *inter alia*, clarified and confirmed that portion of the panel's decision concerning the role of Subpart 2 in implementation of any revised primary ozone NAAQS.[22] The D.C. Circuit then *unanimously* rejected EPA's *en banc* petition on the public health disbenefits and Subpart 2 issues of statutory construction, both of which were independent grounds for remanding the revised ozone standard.[23]

EPA's petition for certiorari followed.

REASONS FOR REJECTING THE "NON-DELEGATION" QUESTION PRESENTED BY EPA AND FOR DENYING THE PETITIONS FOR CERTIORARI ON THE SUBPART 2 HOLDING

I. THE "NONDELEGATION" QUESTION PRESENTED BY EPA, ALA AND STATE PETITIONERS DOES NOT WARRANT REVIEW.

After careful review of a complex record, the court below concluded that EPA had not applied any "intelligible principle" in deciding whether and how to revise the ozone and PM NAAQS. It therefore remanded the cases to allow EPA to identify such a principle.

While the D.C. Circuit correctly held that EPA's interpretation of the Act requires remand to develop an "intelligible principle" to manage risk, EPA App. 14a, it

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[22] EPA App. 70a-82a.

[23] Those judges who dissented from the court's denial of rehearing *en banc* mentioned only the nondelegation issue. *See* EPA App. 91a-99a.

erred in precluding EPA from considering other burdens on society, including the economic and indirect public health consequences of NAAQS decisions, as part of the "intelligible principles" for risk management decisions under § 109. EPA App. 19a-22a. As explained in the Conditional Cross-Petition also being filed in this case, the "adequate margin of safety" language in § 109(b), EPA App. 111a, the "as may be appropriate" language in § 109(d), EPA App. 112a, and the "purposes" section of the Act, ICP App. 1a, permit the Agency to consider the broad economic and social consequences of CAA § 109 risk management decisions.

As a result, although CAA Industry Respondents disagree that the nondelegation question presented by the Government and others makes this case worthy of review by this Court, they believe that if this Court reviews the "nondelegation" holding of the lower court, it must review the scope of EPA's discretion to manage risk under § 109 of the Act.

A. The Question Presented by EPA and Other Petitioners Presents No Conflict With Supreme Court Precedent or With Any Important Principle of Law.

To read the question presented and the arguments of the Government and other petitioners, one would think that the D.C. Circuit had struck down an act of Congress and held that Congress may no longer legislate in broad terms. But that is not what the court of appeals did. All it did was to hold that *EPA's construction* of a statute is inadequate until EPA reveals its principle of decision, and then it remanded the rules to EPA to articulate such a principle. EPA App. 5a, 14a. This by itself is unexceptional, and no "compelling reason[]" for Supreme Court review. Sup. Ct. R. 10.

Indeed, the court could not have done less, faced with EPA's radical view of its own authority. EPA argues that to issue a legally valid decision it need only consider factors it deems relevant. This, EPA explains, is satisfied merely by EPA's discussion of relevant evidence in the *Federal Register*. EPA Pet. 13-14. After that, all is "judgment." In other words, EPA can decide whatever it wants, so long as it has examined an appropriate set of data. Just as the National Environmental Policy Act is "essentially procedural,"[24] EPA hopes to make its own rulemaking obligation under § 109 of the Clean Air Act "essentially procedural."

This is EPA's position, but it is not the law of agency rulemaking and never has been. EPA's view of its role imposes no *substantive* standard on agency rulemaking at all, only the *procedural* requirement that relevant evidence be considered in a decisional vacuum. As this novel theory suggests, agency "judgment" becomes a mysterious process that cannot ultimately be explained but must issue oracle-like from the agency's mouth. "Pay no attention to that man behind the curtain," says the Agency; "I have considered the relevant evidence."

We repeat: All the court required here was that the agency explain its reasoning. Some have argued that the constitutional "nondelegation" rationale for remand in this case might as well have been articulated as "arbitrary and capricious" agency action[25] – that EPA failed to state a

[24] *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

[25] Craig Oren, "Run Over by *American Trucking* Part I: Can EPA Revive its Air Quality Standards?", 29 Envtl. L. Rep. (Envtl. L. Inst.) 10,653, 10,658 (Nov. 1999).

rational basis for its decision.[26] Whatever the rationale, the proposition that an agency's discretion must be guided by an intelligible criterion is so pedestrian as to require no comment, let alone Supreme Court review.

In support of its petition, EPA observes that "Congress does not violate the constitution 'merely because it legislates in broad terms.'" EPA Pet. 12. But from this uncontroversial principle, EPA goes on to argue that because Congress wrote § 109 in broad terms, EPA actions implementing § 109 must be upheld – even if EPA interprets § 109 to provide no criteria to guide its discretion. EPA Pet. 11-12. According to EPA, to rule otherwise would be a "striking departure from this Court's nondelegation jurisprudence." EPA Pet. 11.

Not at all. In an attempt to manufacture a basis for certiorari, EPA attacks a strawman. The lower court did *not* question Congress' authority to legislate in broad terms, and neither do we. Nor did the court hold that § 109 is unconstitutional. Rather, in response to EPA's repeated and strenuous rejections of any reading of § 109 that would provide principles to guide the Agency's choice among alternative standards, the lower court found that EPA's *interpretation* of § 109 – not the statute on its face – reflects an unconstitutional delegation. The court therefore remanded the rules before it to permit the Agency to exercise the discretion given it by Congress in § 109 to interpret and to implement this broad delegation of authority.[27]

[26] *See* CAA § 307(d)(9), EPA App. 126a ("arbitrary and capricious" standard).

[27] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 865 (1984) (Where "Congress has not directly addressed

There is nothing remarkable about this. Courts have frequently required an agency to articulate the legal principles that guide its discretion when it adopts, or refuses to revise, legislative rules.[28] Indeed, we are aware of no decision, by this Court or any other, that has permitted an agency to construe its enabling statute so that no intelligible principle governs the agency's exercise of rulemaking discretion.

This Court has always demanded that agencies be guided by an intelligible principle, as even Petitioner ALA concedes.[29] *See Loving v. United States*, 517 U.S. 748, 771 (1996); *Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 (1976); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). For example, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), the Court found that the agency had provided no intelligible principle for setting standards under § 6(b)(5) of the Occupational Safety and Health Act ("OSHA"). The Court nevertheless found that an intelligible principle could be discerned when this provision was read along with the definitions in the Act (OSHA § 3(8)) and

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the precise question at issue," it is for the agency to construe the statute "within the limits of [the congressional] delegation.").

[28] *See infra* notes 33 - 35 and accompanying text.

[29] *See* ALA Pet. 18 (ALA concedes that "the precedent of this Court . . . requires . . . an 'intelligible principle'" to guide statutory implementation, but argues that the lower court in its explanation of this established principle demands too much precision from EPA).

therefore remanded the case. *Id.* at 641.[30] Curiously, EPA in its petition does not even mention *Industrial Union.* Nor does EPA discuss the other key case on which the lower court relied *(International Union, UAW v. OSHA)*[31] – a case in which the Government did not even seek certiorari.[32]

Therefore, while EPA argues that the lower court has questioned Congress' authority to legislate "in broad terms," it did nothing of the kind. It simply confirmed that when EPA acts pursuant to a broad delegation of authority, EPA's first and most critical obligation is to enunciate, under the second prong of *Chevron,* the legal standard it applies in exercising the discretion given it by Congress. Where an agency misconstrues the scope of the discretion delegated by Congress, it acts unlawfully.[33]

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[30] Petitioner ALA's reliance on this case, *see* ALA Pet. 19, is misplaced, because this case adopts the same method of analysis as applied by the lower court in *ATA*.

[31] 938 F.2d 1310 (D.C. Cir. 1991).

[32] By contrast, petitioners cite a number of cases, including *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946), *U.S. v. Henry*, 136 F.3d 12, 17 (1st Cir. 1998), and *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974), in which statutes delegating broad authority were found constitutional because the language of the statute, its purposes, its factual background and context bounded administrative discretion. Similarly, in this case, the court below did *not* find the CAA unconstitutional; it simply remanded this case for EPA to exercise the discretion delegated to it by Congress. *Cf. South Terminal Corp.* 504 F.2d at 670 (The court set aside a key provision of the rule at issue as "standardless").

[33] *See, e.g., SEC v. Chenery*, 332 U.S. 194, 196-97 (1947); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 109 (1970); *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985).

Reflecting these established principles, judicial decisions commonly set aside agency orders because the agency failed to apply the correct legal standard when it promulgated a rule or took some other action.[34] Similarly, where an agency construes a statute to provide *no legal standard at all* to constrain its discretion, the courts have rejected such a construction because of the "nondelegation" principle.[35] Remanding the case for EPA to develop an intelligible principle for risk management decisions is therefore fully in keeping with the law of this Court.[36]

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[34] For example, in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-19 (1944), Congress authorized the agency to define "area of production" in geographic terms, leading the Court to disapprove a regulation dependent on the number of workers involved instead. *See also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1055 (D.C. Cir. 1995); *Alabama Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994); *Alabama Power Co. v. Costle*, 636 F.2d 323, 355 (D.C. Cir. 1980).

[35] *See, e.g., National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342-43 (1974); *International Union, UAW v. OSHA*, 938 F.2d 1310, 1313; *see also AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 734-35 (1999).

[36] *See Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989) (nondelegation doctrine requires narrow construction of statutes that might otherwise be unconstitutional); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. at 646 (plurality opinion) (agency should be allowed to characterize statute in a way to avoid unconstitutional delegation); *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. at 342 ("the hurdles revealed in [*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)] lead us to read the [Independent Offices Appropriation Act] to avoid constitutional problems"); *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965) (construing statute so as to avoid an invalid delegation); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (the act in question does "not delegate to the Secretary the kind of authority exercised"); *see also Loving v. United States*, 517 U.S. 748, 758

EPA should not have been surprised by this remand, for it had ample warning in the case law of the lower court. In an earlier case addressing NAAQS, the D.C. Circuit anticipated that in future cases "EPA might be required to explain the risk it considered tolerable." *Natural Resources Defense Council v. EPA*, 902 F.2d 962, 974 (1990). Just such a case arose in *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998), *cert. denied*, 120 S. Ct. 58 (1999), resulting in a remand for EPA to explain how it determined what risk was tolerable.[37] This is not an unreasonable demand when the statute requires the Agency to explain why "public health" will be advanced by its decision.[38] Without a legal standard ("intelligible principle") to guide its exercise of discretion, judicial review – including arbitrary and capricious review – simply is not possible.[39]

(1996) ("[T]he lawmaking function belongs to Congress, . . . and may not be conveyed to another branch or entity.").

[37] 134 F.3d at 392-93 ("[U]nless [the Administrator] describes *the standard under which she has arrived at this conclusion*, supported by a '[]plausible' explanation, . . . we have no basis for exercising our responsibility to determine whether her decision is 'arbitrary [or] capricious. . . .'" (emphasis added; citation omitted)).

[38] As the late Senator Chafee observed after the lower court's decision, "this is not a general defect in all of our environmental laws . . . . I agree with the Court as it expresses its discomfort with the vagueness in these two regulations." Statement of Hon. John H. Chafee, Chairman, Senate Environment Committee, Hearings on Clean Air Act (May 20, 1999).

[39] Contrary to EPA's argument, EPA Pet. 17-19, the lower court does *not* call for an unprecedented amount of precision in making NAAQS decisions. Rather, by requiring the Agency to enunciate an "intelligible principle" guiding its risk management decisions under § 109, the court is merely seeking consistency in decisionmaking, without which agency action would be arbitrary by definition.

Finally, EPA points in its petition to statutory language and legislative history which it believes could be used to derive intelligible principles for making risk management decisions under § 109. For example, EPA argues in its petition that an intelligible principle might be found, among other places, in (1) the Act's legislative history, which requires EPA to focus on health effects that are "medically significant," and not "merely detectable," EPA Pet. 15; and (2) the legislative history's direction to consider the "public health" and not "individual health." *Id.*[40]

While EPA's suggestions represent a good starting point for developing an intelligible principle for risk management, they are only a starting point. None of the language EPA identifies itself specifies how to select among a range of uncertain health risks, or among air quality levels that cannot be distinguished from a public health protection standpoint. Rather, this is the task the lower court has directed EPA to undertake on remand, and EPA's petition suggests that the Agency knows what this task entails.

For these reasons, the "nondelegation" question presented in the petitions for certiorari reveals no conflict with any prior precedent of this Court and no important issue of law. Certiorari on this question is not appropriate.

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[40] In its petition for rehearing to the lower court, EPA also argued that an intelligible principle might be found in the "requisite to protect" language of § 109 – namely, that this language requires a standard level no more or less stringent than "necessary" to protect public health. In its petition, EPA also advances for the first time use of a "zone of reasonableness" test. *See* EPA Pet. 18.

B. If Certiorari Is Granted, It Should Be Granted to Address the Scope of EPA's Authority on Remand To Define an Intelligible Principle.

For the reasons set out above, CAA Industry Respondents submit that the nondelegation issue raised by the Government does not offer a compelling reason for certiorari. Should this Court nevertheless grant certiorari on the need for an intelligible principle to guide § 109 risk management decisions, the Court will have to consider the scope of EPA's discretion to derive an intelligible principle from the CAA.

On this issue, the lower court was presented with arguments that neither the "margin of safety" standard-setting language of § 109 nor the "as may be appropriate" standard-revision language of § 109(d) prevents EPA from considering social or economic values or the indirect public health consequences of its decisions on NAAQS. The court of appeals emphatically rejected these arguments under "*Chevron* step one," on the ground that its prior decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), held that the "'[s]tatute . . . make[s] clear that economic considerations play no part in the promulgation of [NAAQS].'" EPA App. 19a.

However, this characterization of *Lead Industries* is at odds with the lower court's later decision interpreting similar language in CAA § 112, as it then existed, requiring regulation of hazardous air pollutants to provide an "ample margin of safety." *Natural Resources Defense Council v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (*en banc*). Although this language is more precautionary than the "adequate margin of safety" in CAA § 109, writing for the court, Judge Bork observed that the "margin of safety" language on its face "does *not* . . . preclude consideration of any factor," *id.*

at 1155 (emphasis added), and that *Lead Industries* and prior D.C. Circuit case law addressing § 109 does not stand for the proposition that "cost and technological feasibility can *never* be considered under the Clean Air Act unless Congress expressly so provides." *Id.* at 1157 (emphasis added).

If the Court decides to grant certiorari in response to the Government's nondelegation issue, we believe that the Court will necessarily have to address the scope of EPA's authority on remand to define intelligible principles for risk management decisions. Nevertheless, "out of excess of caution,"[41] CAA Industry Cross-Petitioners are filing a Conditional Cross-Petition presenting this question directly. CAA Industry Cross-Petitioners believe that this question is worthy of review and therefore would not object to a grant of certiorari to address the question as framed in the Conditional Cross-Petition.

II. THE COURT OF APPEALS' "SUBPART 2" HOLDING DOES NOT WARRANT CERTIORARI.

The petitions for certiorari also address the court of appeals holding that any revised NAAQS for ozone may be enforced only in conformity with Subpart 2 of Part D of the CAA rather than (as EPA alleges) under Subpart 1 as well. EPA App. 81a. In support of its petition, EPA first asserts that certiorari is needed to address an argument that EPA briefed for the first time in its petition for rehearing to the panel, namely, that the lower court lacked jurisdiction to review EPA's decision on this point. EPA Pet. 19-25. Alternatively,

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[41] *See, e.g., Stelos Co. v. Hosiery Motor-Mend Corp.*, 295 U.S. 237, 239 (1935).

EPA repeats the merits arguments that were rejected by the panel in its initial decision and again on rehearing, and which did not garner a single vote for rehearing *en banc*. EPA Pet. 25-29. Neither argument has merit, and neither provides a basis for certiorari.

A. The Government's Belated Finality and Ripeness Arguments Present Neither A Conflict of Law Nor an Issue of Importance.

CAA Industry Respondents challenged EPA's final rule revising the ozone NAAQS on the ground that, because the congressional Subpart 2 program is based on the existing 1-hour NAAQS and because this program applies "by operation of law" under CAA Section 181(a), EPA App. 117a-119a, to "[e]ach area designated nonattainment for ozone" under CAA § 107(d), it was not "appropriate" to replace the 1-hour NAAQS with a new more stringent 8-hour NAAQS that addressed the same public health risks, and that could not be implemented or enforced under Subpart 2. *See* EPA App. 35a.[42]

The lower court rejected the argument that revision of the ozone NAAQS was not "appropriate" on this ground. The court nonetheless accepted Industry Respondents' underlying argument that implementing a more stringent ozone NAAQS would conflict with the Subpart 2 statutory program that Congress established as the exclusive program for

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[42] Members of CASAC in fact recommended against an approach that would require simultaneous application of different ozone standards in different areas of the country, because of the confusion and disruption this would cause. *See, e.g.*, Letter from James H. Price to Thomas O. Miller (April 24, 1995), Ozone JA 388.

implementing the ozone NAAQS: "[a]s the petitioners argue," Subpart 2 of the 1990 Amendments "preclude[s] the EPA from requiring areas to comply either more quickly *or with a more stringent ozone NAAQS*." EPA App. 40a (emphasis added).

EPA argues in its petition for certiorari that the "only issue before the court of appeals . . . was whether the statutory provisions at issue precluded EPA from promulgating the revised standard." EPA Pet. 21. But this was clearly not the case, as State Petitioners recognize.[43] Indeed, the very first issue raised in CAA Industry Respondents' brief below was: "Whether EPA is authorized to substitute its policy judgment for that of Congress by replacing the statutory ozone reduction program designed specifically to implement the 1-hour NAAQS with a new program to implement a different NAAQS?" Furthermore, as the lower court's decision shows, CAA Industry Respondents specifically briefed and argued the issue of EPA's authority to implement a revised ozone NAAQS under Subpart 2 versus Subpart 1 of the Act. *See* EPA App. 40a.[44]

EPA then argues that it "did not take final action in the 1997 ozone rulemaking to implement or enforce the revised ozone NAAQS," and that actual implementation of the revised 8-hour NAAQS will be the subject of later proceedings establishing designations and classifications for the 8-hour NAAQS. EPA Pet. 20. But here again, EPA attacks a strawman. CAA Industry Respondents did not

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[43] State Pet. at 14 (Industry argued that "EPA could neither issue nor enforce a revised ozone standard."); *see id.* at 22.

[44] Indeed, the lower court had to address CAA Industry Respondents' arguments regarding the enforceability of the revised NAAQS in order to fashion relief. *See* EPA App. 57a, 81a.

challenge EPA's designation or classification of areas under the 8-hour NAAQS. *See* EPA Pet. 20. Rather, they challenged EPA's legal conclusion, embodied in 40 C.F.R. § 50.9(b) of the final rule, State App. 113, that EPA has authority to revoke the statutory Subpart 2 ozone reduction program in certain areas, and to replace it in those areas with a program to be developed under the general planning authority of Subpart 1 for a revised ozone NAAQS that is more stringent than the 1-hour ozone NAAQS.

That decision was final. As EPA explained in the preamble to the final ozone rule, that rule reflects EPA's legal conclusion that "the provisions of subpart 2 . . . will continue to apply as a matter of law for so long as an area is not attaining the 1-hour standard. . . . [T]he provisions of subpart 1 . . . would apply to the implementation of the new 8-hour [ozone] standards."[45] EPA codified that final decision in § 50.9(b) of the final rule, State App. 113, which states that "[t]he 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard."

On this important issue, therefore, EPA's decisionmaking process was completed with promulgation of the final rule.[46] Furthermore, important legal consequences flow from this final rule, because of the differences in deadlines and control programs that apply under the Subpart 1 and Subpart 2 programs.[47]

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[45] 62 Fed. Reg. 38,873, ICP App. 75a.

[46] *See id.* (noting that EPA's interpretation of the applicability of Subpart 2 was revised "in light of comments received on its proposed interpretation.").

[47] Thus, contrary to the Agency's assertions, *see* EPA Pet. 23-24, EPA's resolution of the applicability of Subpart 1 versus Subpart 2 to a revised

Indeed, in *EDF v. Browner*, D.C. Cir. No. 98-1363, EPA has asserted that the lower court lacks jurisdiction to hear EDF's challenge to EPA's revocation of the 1-hour NAAQS and Subpart 2 program in specific areas, because EPA's "legal interpretation of the interplay of Subpart 2 and EPA's NAAQS revision authority" was addressed and resolved in the ozone NAAQS rulemaking. EPA Br. in *EDF v. Browner* 27-28, ICP App. 85a-86a. According to EPA, "[o]ther participants in the [ozone] NAAQS rulemaking understood the implications of EPA's interpretation and challenged aspects of it in the pending *ATA* litigation." ICP App. 86a.

Under CAA § 307(b), ICP App. 63a-64a, any challenge to a final legislative rule under the Act must be filed within 60 days of the rule's publication in the *Federal Register*. Because EPA resolved the interplay of Subpart 2 and EPA's NAAQS revision authority in the revised ozone rule and EPA's resolution of this issue is reflected in specific regulatory language (*i.e.*, § 50.9(b)), CAA Industry Respondents' only opportunity to challenge EPA's resolution of this issue was in this case.[48] For these reasons, EPA's belated attempt to manufacture a finality or ripeness argument provides no basis for certiorari.

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ozone NAAQS plainly meets the conditions for finality set forth in *Bennett v. Spear*, 520 U.S. 154 (1997), and other cases cited in its petition.

[48] EPA's reliance on cases not addressing final agency regulations, promulgated after notice and comment rulemaking and expressly made subject to pre-enforcement judicial review, is misplaced. *See, e.g., Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998); *Dow Chemical v. United States Environmental Protection Agency*, 823 F.2d 319, 324-25 (5th Cir. 1987) (distinguishing final rules, developed after notice and comment rulemaking, that "fix[] a legal relationship.").

B. EPA's Arguments on the Merits, Which Have Been Rejected by the Panel and by the Court of Appeals *En Banc*, Provide No Basis for Certiorari.

The other arguments in EPA's petition for rehearing have been considered and repeatedly rejected by the lower court. While EPA asserts that the court misunderstood the CAA, EPA Pet. 25, certiorari is not a forum simply to re-argue matters resolved by the court of appeals. The circuit court's resolution of the interplay between Subpart 1 and Subpart 2 in implementing a revised NAAQS does not conflict with the decision of any other court and does not present a question of federal law that warrants the attention of this Court. *See* Sup. Ct. R. 10.

In support of its petition, EPA argues once again that "the CAA does not precisely address "how to reconcile Subpart 1 . . . . with Subpart 2." EPA Pet. 27. This is simply not the case, as the lower court carefully explained.

First, the court observed that CAA § 181(a) on its face provides that "[e]ach area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under Table 1, by operation of law." EPA App. 38a. This language establishes that Subpart 2 applies to "all areas designated nonattainment under any ozone NAAQS." *Id.* As the court explained, because "Congress has spoken on the 'precise question at issue,'" the court must give effect to the language of the Act under the first prong of *Chevron*. *Id.*[49]

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[49] The court also reviewed the language of § 172(a)(1)(C) and (a)(2)(D), which specifically provides that the attainment date and classification provisions of Subpart 1 "do not apply to nonattainment areas for which

Second, the lower court addressed related CAA provisions, the structure of the Act, and its legislative history, and it found them all consistent with the plain language of § 181. For example, the panel rejected EPA's argument that the reference to "section 7407(d)" in § 181(a) should be read as "section 7407(d)(4)" in order to limit the application of Subpart 2 to areas that were designated nonattainment in 1990.[50] As the court observed, this is not the language of the statute, and the legislative history shows that Congress acted purposefully when it referenced "section 7407(d)" to make Subpart 2 applicable to *all* current and future ozone nonattainment areas. EPA App. 38a - 39a. As a result, the Subpart 2 program applies to one-hour *attainment* as well as one-hour nonattainment areas, *including [one-hour] attainment areas that are redesignated to nonattainment in the future.*[51]

Regarding the overall structure of the CAA nonattainment program, the court observed that "Congress enacted Subpart 2 because of the failure of the controls in Subpart 1 to bring

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classification and attainment dates are specifically provided under other provisions of this part," as they are for ozone in Subpart 2. EPA App. 35a. While ALA now argues that the general planning requirements of Subpart 1 in § 172(b) and (c) do not contain similar "ouster" provisions, ALA Pet. 26, the simple response is that "ouster" language is not needed in these later subsections of § 172 once areas are "ousted" from the deadline and classification provisions that trigger the planning requirements.

[50] *See also* EPA Pet. 28 n.16. (Subpart 2 should be read to apply "only for nonattainment areas designated under Section 107(d) for the then-current one-hour ozone standard," based on § 107(d)(1) and (4)).

[51] CAA § 181(b)(1), EPA App. 119a (providing deadlines for attainment that are "extended by operation of law" for areas that are "subsequently redesignated to nonattainment for ozone.")

areas into attainment." EPA App. 39a. In order to resolve this problem, Congress in Subpart 2 decided not to "continue [to treat] all ozone nonattainment areas alike," but to provide different attainment deadlines and different control strategies for different areas depending on the ambient levels of ozone in an area in excess of the one-hour NAAQS. EPA App. 40a.

For example, Congress in Subpart 2 made clear that areas with intractable ozone problems (e.g., Los Angeles and Houston) would have to apply specific and aggressive control programs, but would not be subject to near-term, inflexible deadlines that could threaten economic shutdown. *See* EPA App. 41a. The court found that while EPA might have authority to revise the ozone NAAQS, EPA did *not* have authority to ignore the balance struck by Congress in Subpart 2 in favor of an alternative ozone reduction program under Subpart 1 that could require even more drastic measures.

As the court explained, under "EPA's interpretation . . . [the Subpart 2 statutory] scheme would have been stillborn had the EPA revised the ozone NAAQS immediately after Congress enacted the 1990 amendments." EPA App. 42a. EPA's assertion of authority to revoke the statutory Subpart 2 program "does not square with . . . the long-term nature of the attainment scheme enacted in Subpart 2," *id.*, and "clearly runs counter to the *comprehensive* enforcement scheme" based upon the one-hour NAAQS that Congress enacted in Subpart 2. EPA App. 41a (emphasis added).

The court also reviewed the legislative history, which shows that "Congress responded to the continued ozone problem [in 1990] by enacting a new enforcement scheme, which it codified as Subpart 2." EPA App. 32a. In other words, while Subpart 1 provides general planning requirements, Subpart 2 provides specific and detailed ozone-requirements for nonattainment areas, for attainment areas in

the ozone transport region, for "maintenance plans" in attainment areas, and for "attainment" areas that subsequently became "nonattainment" areas.[52] The legislative history confirms that Subpart 2 is "the Congress's comprehensive plan for reducing ozone levels *throughout* the country." EPA App. 33a (emphasis added).

In response to EPA's petition for rehearing below, the court clarified and confirmed its holding that "EPA can enforce a revised primary ozone NAAQS *only* in conformity with Subpart 2." EPA App. 81a (emphasis added).[53] The court also emphasized that its remand order was "without prejudice to the ability of any party to apply for vacatur" should EPA attempt to implement the revised standard. *Id.* As a result, the decision on rehearing confirms that, as the court held, the 1990 Amendments to the Act "must preclude the EPA from requiring areas to comply either more quickly *or with a more stringent ozone NAAQS*." EPA App. 40a. (emphasis added).

Finally, EPA argues that the lower court's decision will disrupt EPA's plans regarding ozone reductions.[54] But it is EPA's rule that has disrupted the carefully crafted *congressional* program for ozone reductions, and the court of appeals simply restored that program – a program that has produced and is continuing to produce substantial reductions in ozone. EPA's continued disagreement with this decision

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[52] *See* CAA §§ 182-185A, ICP App. 8a-62a; *see also* H.R. Rep. No. 101-490, Pt. 1, at 145-148, 229-258, *reprinted in* 2 1990 Legis. Hist. 3169 - 3172, 3253-3282.

[53] The State Petitioners correctly observe that Judge Tatel's concurring statement "is hard to reconcile . . . with the panel's opinion" regarding the non-enforceability of the revised ozone NAAQS. *See* State Pet. 22 n.8.

[54] *See* EPA Pet. 11; *see also* State Pet. 17, 28.

presents no conflict of law or important issue that merits certiorari.

C. The Interlocutory Nature of the Lower Court's Decision Counsels Against Granting Certiorari on the Subpart 2 Questions Presented by EPA.

The court of appeals remanded the revised ozone NAAQS to EPA because the Agency refused, as a statutory matter, to consider the increased public health risks (due to increased UVB radiation exposure) its revised standard would create. *See* EPA App. 47a - 48a. As a result, regardless of what this Court does here, EPA will have to undertake further rulemaking on the ozone standard to determine whether *any* standard revision is "appropriate" under § 109(d) in light of (1) the increased cancer and mortality risks associated with a more restrictive standard that increases UVB radiation exposure,[55] and (2) the conclusion of its independent science advisers that *none* of the alternative air quality levels under consideration can be distinguished as significantly more protective of public health.[56]

Because there will be additional rulemaking addressing the appropriateness of standard revision regardless of any action

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[55] Ozone reductions of the magnitude associated with EPA's revised standard could result in 2,000-11,000 additional cases of melanoma skin cancer per year, 25-50 melanoma related deaths per year, and up to 28,000 new cataract cases per year due to increased ultraviolet-B radiation exposure. R. Lutter and C. Wolz, "UV-B Screening by Tropospheric Ozone: Implications for the National Ambient Air Quality Standard," 31 *Env'tl. Sci. & Tech. News* 142-46 (1997), Ozone JA 2759.

[56] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 236.

by this Court, certiorari is unnecessary on the Subpart 2 issues.

CONCLUSION

For the foregoing reasons, if certiorari on the "nondelegation" issue is granted, it should embrace the issue presented by CAA Industry Cross-Petitioners in their Conditional Cross-Petition for Certiorari. Otherwise, certiorari should be denied on the questions presented by the Government and other petitioners.

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February 28, 2000